Supreme Court of the United States

OCTOBER TERM, 1948

No. 176.

GEORGE G. REINING, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY STATEMENT.

The Opinion Below; the Jurisdiction; the Question Presented, and Statement of the Case are fully set forth in the Petition for Writ of Certiorari previously filed herein.

STATEMENT.

At page 3 of the brief for the United States in opposition to the petition for writ of certiorari, the following statement appears:

> "No objection was registered to this statement (that of the prosecuting attorney) at the time, but after the prosecutor had completed his summation *and the jury*

had been excused, petitioner's counsel moved for a mistrial * * * ."[1]

The above statement would make it appear that the jury had retired to consider its verdict before counsel for the defendant, (Reining), objected to the statement of the prosecutor that "There is no dispute about that and no denial" had been made. However, it is not a fact that the jury had been "excused" at the time the objection was made to the statement of the prosecutor. The record discloses (R. 208) that the government had rested its case and the Court recessed until 2 o'clock the following day, at which time the prosecuting attorney moved to reopen the case in order to present certain additional evidence (R. 209, 211). Thereafter, the jury withdrew from the courtroom (R. 211), while the Court heard argument by both sides on several motions. Thereafter, counsel for both prosecution and defense addressed the jury. In the course of the argument of the prosecuting attorney, the statement complained of was made (R. 225). Thereafter (R. 226) the Court recessed until the following morning, whereupon counsel for the defendant moved for a mistrial for the reasons and upon the grounds set forth in the record at p. 226. The Court (R. 226) deferred ruling on that motion. Upon reconvening on May 17, 1947 (R. 227) the Court asked the jury to retire to its room while the Court heard argument in respect of the objectional statement. Thereafter, the Court made its charge to the jury (R. 233-249), whereupon the jury retired to consider its verdict.

ARGUMENT.

Examination of Exhibit 47 (R. 176) will reveal that that letter was purportedly signed by the defendant, George G. Reining. The statement of the prosecuting attorney that—

"there was no dispute about that and no denial"

[1] Parenthetical matter and italics supplied.

had reference only to that letter and to the fact of its having been written and signed by George G. Reining and mailed or caused to be mailed by Reining to A. C. Smith.

The observations of the trial court (R. 229, 230), regarding the prosecutor's statement clearly reveal, that the Court was itself in doubt as to the import of the statement. Its clear duty, under the circumstances, was immediately to have specifically instructed the jury to disregard the statement. The error in this respect was in no wise cured by the statement of the Court appearing at page 248 of the Record. The statement made by the Court, appearing at page 249 of the Record, only served to aggravate the matter, as will be pointed out hereinafter.

There are numerous cases supporting and confirming the *rationale* of the decisions in the case of *Wilson* v. *United States*, 16 S. Ct. 765, 37 L. Ed. 650 and *De Mayo* v. *United States*, 32 Fed. (2d) 472.

This Court, in *Johnson* v. *United States*, 318 U. S. 189, 87 L. Ed. 704, said (318 U. S., p. 199-87 L. Ed., p. 712):

> "* * * We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for misuse of the grant of the claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

The observations of the trial Court, constituting part of its charge to the Jury, as they appear at pp. 248 and 249 (see Appendix) of the Record, did not have the effect of overcoming the damaging effect of the statement of the prosecuting attorney to the effect that Reining had not denied having written and signed the letter or having mailed it or caused it to be mailed. On the contrary when,

at the request of the prosecuting attorney (Mr. Phillips), the Court enlarged upon its charge, this only served to aggravate the matter. The Court said (R. 249):

> "Whether the remarks of counsel are proper or improper, Gentlemen, are matters for the Court to determine and not for you to determine. * * *"

Petitioner concedes that the statement is a correct statement of the responsibility of the Court, but it was error for the Court to have stopped where it did. It should have referred specifically to the statement of the prosecutor that there had been no denial by the defendant and should have specifically instructed the Jury to disregard the statement.

In the case of *United States* v. *Snyder*, 14 Fed. 554, under facts substantially parallel to those of the case at bar, the trial court immediately corrected the error, and properly instructed the jury regarding the objectionable observations of the prosecuting attorney.

In the case of *McKnight* v. *United States*, 115 Fed. 972, 983 (C.C.A. - 6th Cir.), observations of the trial judge, of import similar to those involved here, were held not to have been cured by the trial court's subsequent statement to the jury upon that subject. In the *McKnight* case, the court quoted from the language of Mr. Justice Field in *Wilson* v. *United States, supra*, as follows:

> "It (the Court) should have said that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

In this case the letter referred to by the prosecuting attorney as not having been denied (Exhibit 46, R. 175) could have been denied by the defendant only. In this aspect of the matter, the case of *Linden, et al.* v. *United States*, 296 Fed. 104 (C.C.A.—3rd Cir.) is of significance. The court, in that case said (p. 106):

> " * * * It follows, therefore, that the only persons who could possibly contradict their testimony were the de-

> fendants themselves. Obviously, then, the only person to whom the learned trial judge could have alluded as not having contradicted the government's testimony and as not having given an 'explanation of the transaction' were the defendants. This is so clear that it does not require discussion. We are of opinion that this part of the court's charge involved error and that the conviction thereunder was not valid. * * *"

In the *Linden* case, the objectionable language of the court was as follows (p. 105, 106):

> "Now, there is not any evidence at all in explanation of that transaction, and there you have the bare facts."

In the case of *Nobile* v. *United States,* 284 Fed. 253 (C.C. A. - 3rd Cir.) the error assigned was based upon an observation of the court in its charge to the jury. In that case the court pointed out that the statute (Act of March 16, 1878, 20 Stat. 30, c. 37) was not only a restraint upon counsel but upon the courts. This principle has been recognized and affirmed by this Court in several cases, including that of *Johnson* v. *United States, supra.*

In *Barnes* v. *United States,* 8 Fed. (2d) 832 (C.C.A. - 8th Cir.) that court, reversed the lower court and held that prejudicial error had been committed as result of colloquy between the court and the counsel, the court said (p. 834):

> "This assignment presents a serious question. The defendants had not testified in their own behalf. The court promptly declared the statement to be highly improper. He did not, however, *charge the jury to disregard its effect, and refused to accede to the demand of counsel that the jury be discharged.* The colloquy that ensued undoubtedly emphasized and made prominent the potential application of the language used. We feel, therefore, constrained to hold that prejudicial error was thereby committed. It is true, but for the pointed remarks of counsel for defendants, the application might have passed unnoticed; nevertheless, this entire colloquy was precipitated by the original improper statement of the prosecutor, and the language

employed was extreme and striking in its terms. It must be noted that the sale of the opium took place in the night, when no one but the defendant Bowers and the witness Pryor were present. There were no others, besides the defendant, Bowers, who could have contradicted the testimony of Pryor as to the sale, and pronounced it false. Of course, the sale itself, and the circumstances under which it was made, constituted the gist of the offense, and while, in our judgment, there was ample testimony to establish clearly the guilt of the defendants, nevertheless the protection of defendants against comments of this nature is expressly safeguarded by statute and jealously preserved by the courts."[1]

In the instant case, as in the *Barnes* and many other cases, the only person who could have denied writing the letter to A. C. Smith was the person who was supposed to have written it, i. e., the defendant, George G. Reining.

As has been pointed out, after the prosecution had rested, but before the case went to the Jury, the prosecutor moved to reopen the case in order to put in additional evidence, which consisted of the appearance bond of Georg G. Reining such document bearing Reining's known signature, (Exhibit 48, R. 210, 11). This document was offered by the prosecutor (R. 209) for the purpose of establishing the signature of George G. Reining on the bond, for comparison with other "signatures" of George G. Reining, which included the "signature" "Geo. G. Reining", appearing on Exhibit 46 (R. 175), to which the prosecuting attorney had specifically alluded (R. 225) as not having been denied.

The statute was designed to protect persons accused of crime in those circumstances, where, in the exercise of their fundamental right, they see fit not to take the witness stand in their own defense. In this case, the language of the prosecuting attorney can be construed only as calling the attention of the Jury to the fact that the defendant did not deny the letter, or his purported signature thereon. It

[1] Italics supplied.

was the manifest duty of the trial court to have instructed the jury specifically and immediately that no inference unfavorable to the defendant could be drawn therefrom. The Court's failure to do so was dereliction and in clear derogation of the rights of the accused.

As has been pointed out by this Court, neither trial courts nor prosecuting attorneys will be permitted to pare away from the fundamental constitutional and statutory safeguards afforded persons accused of crime under the laws of the United States. It is suggested that unless this Court grants the petition for writ of certiorari and corrects the error here complained of, this case may later be relied upon in other cases and these, in turn, in still other cases, thus finally to destroy these important safeguards and gradually to emasculate the decision of this Court in *Wilson* v. *United States, supra.*

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be granted, the decision of the lower court reversed, and the cause remanded. *Helvering* v. *Tyng, Helvering* v. *Buchsbaum,* 308 U. S. 527, 84 L. Ed. 445.

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APPENDIX.

The Court:

I will charge you further, Gentlemen, in addition to what the Court has already said to you. The Jury is instructed that the burden of proving every essential element of the case rests with the prosecution and that the defendant does not have to offer any defense or to disprove any testimony presented by the prosecution; that he does not have to testify in his own defense or to offer any witnesses in his defense unless he so desires and that the prosecution has no legal right to comment on the lack of such failure to testify or to offer witnesses in his defense.

Mr. Phillips:

That last part is not exactly clear.

The Court:

Further, Gentlemen, the Court instructs you that while the law permits the defendant to testify, he is under no obligation to do so, and his failure to d. so creates no presumption against him; and you are not authorized to draw any deduction from the failure of a person to testify—that is, the defendant to testify. With his silence you have nothing to do, and you are to decide the case with reference alone to the testimony actually introduced without regard to what might not or what might have been found if other persons had testified.

Mr. Phillips:

If Your Honor please, in view of the wording of the last clause of the charge requested, I ask you to charge the Jury that the question of whether or not the United States Attorney in making his argument made any improper reference or anything like that to the failure of the defendant to take the stand is a matter for the Court to determine and they have nothing to do with it. In other words, it's not a question for them to determine.

The Court:

Whether the remarks of counsel are proper or improper, Gentlemen, are matters for the Court to determine and not for you to determine. I will say this, Gentlemen: That counsel in the case are, as you know, lawyers representing one or the other side of the case, and they are not witnesses, and any statement that they might make before you is not

to be taken as testimony unless of course they have been sworn and have testified as witnesses. Their purpose in the case is to assist you and the Court in the trial of the case and the presentation of the case; and then to present to you their own deductions and conclusions that they drew from the evidence to give you to consider for your enlightenment and assistance. And so I just caution you, Gentlemen, that anything that might be said or any testimony that might be quoted by counsel in the case, which sometimes inadvertently is misquoted, you are not to take counsel's statement of what the testimony was here as final. It is your recollection of the testimony, Gentlemen, that counts—the testimony that you have heard from the witnesses on the stand, as you remember it, and not what counsel or the Court may say to you the testimony was in the case.

All right, Gentlemen, you may retire now and consider your verdict.